No. 14582.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THE TIMES-MIRROR COMPANY, a corporation,

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Opinion Below.

The findings of fact and conclusion of law of the District Court [R. 33-40] are not officially reported.

Jurisdiction.

This appeal involves excess profits taxes for the calendar years 1943 and 1944 in the amount of $62,357.30, plus interest. The taxes in dispute were paid on October 21, 1949. [R. 35.] Claims for refund were filed on January 26, 1950, and were rejected by notice dated June 27, 1952. Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on November 20, 1952, the taxpayer brought an action in the District

Court for recovery of the taxes paid, plus interest thereon as provided by law. [R. 3-22.] Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1340 and 1346(a)(1). The judgment was entered on July 29, 1954. [R. 41-42.] Within sixty days and on August 26, 1954, a notice of appeal was filed. [R. 42-43.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the decision of the District Court to the effect that the cost to taxpayer of microfilming its file of bound copies of back issues of newspapers was an ordinary and necessary business expense is supported by substantial evidence and not clearly erroneous.

Statutes Involved.

Internal Revenue Code of 1939:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—[As amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798.]

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *." (26 U. S. C., 1952 ed., Sec. 23.)

"SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) General Rule.—In computing net income no deduction shall in any case be allowed in respect of—

* * * * * * * *

(2) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate, * * *." (26 U. S. C., 1952 ed., Sec. 24.)

Statement.

Appellee does not controvert the statement of facts contained in appellant's brief at pages 3 through 6.

Summary of Argument.

The expenditures to microfilm back issues of appellee's newspapers were made to protect its library from a threatened bombing. Appellee had experienced an earlier bombing and knew of its harmful effect upon records vital to the operation of a newspaper. The microfilms did not improve appellee's plant nor increase, extend or prolong its useful life. They did not increase appellee's net or gross income, but allowed appellee to maintain its business on the same scale, not increase it. No capital asset or capital value was created. Therefore the amounts expended for microfilming were ordinary and necessary expenses in carrying on appellee's business as a newspaper, and as such are deductible in computing taxable net income. The fact that the Commissioner of Internal Revenue allows the cost of microfilming "current" records to be deducted establishes the general nature and purpose of the item, and deductibility cannot be denied merely because of some incidental use of the microfilms in years subsequent to the taxable years before the Court.

The Findings of Fact, Conclusion of Law and Judgment of the District Court are supported by substantial evidence; they are not clearly erroneous; and they should be affirmed.

ARGUMENT.

Appellant's argument is twofold: First, that certain of the Findings of Fact are not supported by the evidence; and Secondly, that in no event are the microfilming expenses involved herein deductible as ordinary and necessary business expenses. Since the second of these arguments requires an analysis of the basic concept of what expenses are deductible, we will discuss that argument first. The Findings of Fact, and appellant's contentions in respect thereof, will be dealt with subsequently.

I.

The Expense of Microfilming Appellee's Newspapers Is an Ordinary and Necessary Business Expense.

Section 23(a)(1)(A) of the Internal Revenue Code of 1939, which is applicable to the instant case, involving the taxable years 1943 and 1944, provides that in computing net income there shall be allowed as deductions "* * * All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *."

Appellant argues that the microfilm expenses here involved are not ordinary and necessary business expenses, but are capital expenditures, *i. e.,* amounts paid out for "* * * permanent improvements, or betterments made to increase the value of any property, * * *" and, as such are not deductible under Section 24(a)(2) of the Internal Revenue Code of 1939.

The question of what constitutes an ordinary and necessary business expense resulting in deductibility on the one hand, and what constitutes a capital outlay resulting in nondeductibility on the other, has been one of

the more fertile fields of tax litigation for many years. As a result, certain principles have been pronounced by the courts over the years, which have established the criteria to be used in determining deductibility. Appellee contends that the expenditures for microfilming in the instant case satisfy all of the criteria for deductibility and that therefore the District Court's decision was correct and should be affirmed.

The two key words in Section 23(a)(1)(A) are "ordinary" and "necessary." We do not understand appellant to contend that the microfilm expenses were not "necessary." The decision to microfilm was one made by the management of a newspaper which had experienced a bombing in 1910, and sought protection from a recurrence of damage to its library.[1] The Courts are (and taxing authorities should be) slow to override the exercise of experienced business judgment. (*Welch v. Helvering,* 290 U. S. 111 (1933).)

We perceive appellant's primary argument to be that because of the size and nonrecurring nature of the expenditure (in such an amount), as well as the fact that appellee may obtain some benefit (even though incidental) in years subsequent, the general purpose of the expenditure

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[1]As a result of the October 1, 1910, bombing of appellee's plant, all back issues for the years 1884 and 1889 to 1893 were missing; some issues for the years 1881, 1882 and 1885 were badly damaged by fire damage, *i.e.,* some watermarked, others brittle, and still others with pages torn. [R. 52-54.] Mr. Downing, then Treasurer, Comptroller and Secretary of appellee, had experienced the 1910 bombing; and Mr. Bowers had investigated the effects of the 1910 bombing of appellee's plant and knew the effect of bombing in other countries on records and buildings. [R. 55, 71-72.]

must be to obtain a capital asset.[2] Let us examine some of the significant cases dealing with these considerations.

The Supreme Court of the United States in the case of *Welch v. Helvering,* 290 U. S. 111, 78 L. Ed. 212, with reference to Section 23(a) of the Code, stated (p. 114):

> "* * * Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack. (*Cf.* Kornhauser v. United States, 276 U. S. 145, 72 L. ed. 505, 48 S. Ct. 219.) The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. At such times there are norms of conduct that help to stabilize our judgment, and make it certain and objective. The instance is not erratic, but is brought within a known type." (290 U. S. at pp. 113-114.)

Surely if the expenses of defending a "lawsuit affecting the safety of a business" (although it "may happen once in a lifetime") are deductible, the cost of microfilming

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[2]Total microfilming cost was $84,147.04; $73,156.19 for the negatives and $11,022.85 for 3 positive prints. [R. 52.] This is compared with total expenses of all kinds for appellee of $8,990,344.00 for 1943 and $8,768,475.00 for 1944, or a total of $17,758,819.00. [R. 65.] Thus microfilm expenses constitute less than one-half of one per per cent of total expenses for the two years before the Court.

back issues of newspapers merely for the purpose of preserving plaintiff's business is deductible.

The Tax Court of the United States has consistently held as deductible expenditures which were not made to improve, better, extend or increase the original plant or to prolong its useful life. One of the recent decisions of the Tax Court was the case of *American Bemberg Corporation v. Commissioner,* February 25, 1948, 10 T. C. 361, affirmed 177 F. 2d 200 (C. A. 6, 1949). In this case it appeared that very disastrous cave-ins had occurred under the taxpayer's plant, making the plant unsafe for operations. The taxpayer, to remedy this, expended in 1941 the sum of $734,316.76 and in 1942 $199,154.33. The Commissioner in that case, as in the present case, contended that the expenditures were not ordinary and necessary expenditures but should be capitalized. The Tax Court, in its opinion stated (pp. 376-378):

> "In connection with the purpose of the work, the Proctor program was intended to avert a plant-wide disaster and avoid forced abandonment of the plant. The purpose was not to improve, better, extend, or increase the original plant, nor to prolong its original useful life. Its continued operation was endangered; the purpose of the expenditures was to enable petitioner to continue the plant in operation not on any new or better scale, but on the same scale and, so far as possible, as efficiently as it had operated before. The purpose was not to rebuild or replace the plant in whole or in part, but to keep the same plant as it was and where it was. * * *
>
> "* * *
>
> "We think a consideration of the above factors, which are more fully set out in our findings, shows that the expenditures in question fall into the 'expense' class rather than the 'capital' class. The

original geological defect has not been cured; rather its intermediate consequences have been dealt with. The required continuance of the three-fold inspection program and the requirement that even normal leakage be kept from the plant site show that the original defect still exists and that plant operation has had to be modified to take account of the continued existence of that original defect.

"One of the leading cases in the field of what are capital expenditures and what are business expenses is *Illinois Merchants Trust Co., Executor,* 4 B. T. A. 103; acquiesced in, 2 C. B. 2. That case has been often cited and approved. In that case the taxpayer owned a warehouse resting on wooden piles. During the taxable year unprecedently low water exposed parts of the piles usually under water. Dry rot set in and the warehouse began to settle so badly as to threaten collapse. To prevent a total loss and halt this accelerated deterioration, the taxpayer had all piles sawed off below the low water mark and installed concrete sections between the stumps of the piles and the bottom of the building. Much of the floor was removed in the process and one exterior wall was considerably shored up. It was held in that case that the expenditures there involved were not for permanent betterments and improvements, but were repairs and deductible as ordinary and necessary business expenses. For similar holdings see *Yakima Hop Co.,* 8 B. T. A. 441; *John A. Schmid,* 10 B. T. A. 1152; *Tampa Electric Co.,* 12 B. T. A. 1002; *Zimmern v. Commissioner,* 28 Fed. 2d 769, reversing 9 B. T. A. 1382; and *Buckland v. United States,* 66 Fed. Supp. 681.

"In the *Buckland* case, *supra,* the cost of stopping leaks in the walls and roof of a factory building within 16 months of its purchase was held deductible as a repair expense and was not a capital expenditure,

even though amounting to 35 per cent of the value of the building, where such repairs enabled a continuation of the existing use of the building by taxpayer's tenants. Notwithstanding the high cost, it was found that the nature of the work was the restoration of a damaged fabric not extending to the replacement of any sizeable unit of the building and conformed closely to the Board's definition of repairs in *Illinois Merchants Trust Co., Executor, supra.* In the *Buckland* case the court, among other things, said:

* * * * * * * *

> 'Defendant's [U. S.] contention appears to be that repairs are only those mendings of the fabric which recur year by year. This is not consistent with the meaning given "ordinary and necessary" in *Welch v. Helvering, Commissioner,* 290 U. S. 111. The work done at the instance of the taxpayer was a normal response to the need developed in the course of stopping the leaks in the walls and roof of the factory building, to enable the continuation of the existing use of the building by the taxpayer's tenants.'" (10 T. C. at 376-378.)

Despite the admonition of the Supreme Court of the United States in *Welch v. Helvering, supra,* and many other cases before the Tax Court of the United States, the defendant has attempted, as he is now attempting in this case, to classify every substantial expenditure as a capital expenditure. This is evidenced by the decision of the Tax Court in the case of *Roundup Coal Mining Co. v. Commissioner,* 20 T. C. 388 (1953), in which the Court stated:

> "Respondent contends that the expenditure for the 1944 air shaft must be considered a major capital

item of improvement which enhanced the value of the mine and cannot be considered a minor item of equipment used solely for the purpose of maintaining normal production. * * *

"* * * Respondent now, as he has so persistently in the past, seeks to add another condition which must be met before taxpayer may be permitted to expense the cost of facilities 'necessary to maintain the normal output' of a mine. That condition is that the taxpayer must show the expenditure to have been *minor* rather than *major*. We find no authority for his contention. The terms are entirely relative and indeterminable. We must decide this issue upon the basis of Regulations 111, section 29.23(m)-15(*a*) and (*b*), because that regulation sets forth the only recognized pattern upon which to base decision." (20 T. C. at 394.)

With the above authorities in mind, let us examine the nature of the expenditures here involved.

The preservation of records is one of the most common and universal practices of American industry. Such preservation has been accomplished in many ways. Before the advent of typewriters, businessmen preserved their records by making an extra copy of documents in longhand. With the advent of typewriters duplicate copies have been made. With the progress of science the photo machine and the microfilm have been and are now used. Surely the method of preserving records does not make the practice any the less ordinary and necessary. The practice of preserving records has been an ordinary and necessary function of business ever since men began to trade.

There is no difference between the daily, monthly or annual preservation of records and the preservation of records of prior years. A business concern that in December microfilms its records for the full year is merely performing an ordinary and necessary business function. Likewise the microfilming of records of the year before last and preceeding years is an ordinary and necessary function. It is an ordinary and necessary business function to preserve records. Indeed, the Federal and State Governments require the maintenance and preservation of records and have always recognized such practice as ordinary and necessary.[3]

Suppose, for instance, that a company had a long-term lease or contract which because of its constant use during past years was deteriorating and as a consequence new copies were made either by retyping, photostating or microfilming; would the cost of reproducing this old document be considered a capital investment? Surely not! Would there be any difference in principle if there had been more than one document or even a hundred? Surely not! It is common practice for business firms to make several copies of documents. Surely the number of copies that are made for record preservation does not detract from the ordinary and necessary business function. Nor does the fact that the microfilming of old records occurred only once detract from its ordinary and necessary function. Neither does the cost of such microfilming in any way detract from its ordinary and necessary function.

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[3]26 U. S. C. Secs. 51, 53(a); Reg. 111, Secs. 29.41-3 and 29.54-1.

To paraphrase the language of the Supreme Court (*Welch v. Helvering,* 290 U. S. 111, 78 L. Ed. 212),

> "the microfilming of old records to preserve the 'safety of a business may happen once in a lifetime.' The cost of such microfilming may be 'so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against' the loss of such records."

It is clear from the Supreme Court's decision in the *Welch* case, *supra,* that the expenditures made in defending the "safety" of a business are ordinary and necessary expenses despite the fact that such expenditures may occur only once in a lifetime. The lawsuit alluded to in the *Welch* case was an attack against the safety of the business. Surely the expenditures made in defending against a *threatened* attack upon the safety of a business would likewise be ordinary and necessary expenditures. In principle there can be no difference between an attack and a threatened attack. Expenditures in either instance would be for the same purpose, to wit, the preservation and safety of the business.

The same principle has been applied in a great number of cases dealing with newspaper publishing companies in another connection. These cases hold that amounts expended to *maintain* circulation at a given volume are ordinary and necessary expenses, as opposed to expenditures which are incurred to *increase* circulation which are capital in nature. It is obvious that new subscribers will be of benefit to the newspaper for a period of time in the future, but if their subscriptions are obtained primarily

for the purpose of *maintaining* the current volume of circulation, the courts have uniformly held that the cost represents an ordinary and necessary expense of doing business, deductible in full in the year it is incurred. *Perkins Bros. Co. v. Commissioner,* 78 F. 2d 152 (C. C. A. 8, 1935); see also *Willcuts v. Minnesota Tribune Co.,* 103 F. 2d 947 (1939), Cert. Den., 308 U. S. 577. This is true even though, as in the *Perkins* case, the costs expended to *maintain* circulation incidentally resulted in some actual *increase* in circulation, the Court stating:

> "* * * We must bear in mind that we are here considering the character of an expenditure, and that is dependent upon its general purpose rather than upon an incidental result." (78 F. 2d at p. 155.)

Clearly the microfilm expense was incurred to *maintain* and to *protect* appellee's library of back issues; this was its general purpose and governs the character of the expense. The mere fact that some incidental use or benefit may be enjoyed should not be allowed to obfuscate the true character of the expense or defeat its deductibility.

The District Court has found that

> "The microfilming was not done to, nor did it, improve the original plant of plaintiff [appellee], or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of plaintiff. It was done solely as a means of protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense." [R. 38-39.]

Clearly these facts satisfy the criteria for deductibility discussed in the cases referred to above.

Appellant appears stubbornly to contest the trial court's finding that the microfilm expenditures "* * * did not create an asset or capital value." Because, of course, such a finding, if supported by the record, deals a fatal blow to this appeal. Therefore appellant repeats over and over in its brief that a capital asset was created. (Br. 12, 13, 14, 15, 16, 19.) A capital asset is not made by appellant's mere *ipse dixit.* Such a rule has not replaced logic, reason and evidence as the recognized basis for deciding lawsuits.

The main touchstone of appellant's argument that the microfilm expenses must be capitalized is that appellee may enjoy some incidental benefit or use of the microfilms during a taxable year subsequent to those during which the expenditures were incurred. But this is not the controlling test. Recently, the Commissioner of Internal Revenue sought to compel capitalization of expenses incurred, by a designer, manufacturer and installer of laboratory equipment, in the printing and distributing of a catalog of its products and installations, on the theory that the benefit to the taxpayer, as a result of the catalog, would be enjoyed by the taxpayer, in years subsequent to those during which the expenditures were made. In holding that the expenditures were deductible as ordinary and necessary business expenses, the United States Court of Appeals for the Sixth Circuit stated in part as follows:

> "* * * The fact that an expenditure produces something that has a useful life extending beyond the taxable year is clearly not the controlling test. [citing cases]. It has been held a number of times that advertising expense, even though incurred heavily in a certain year with resulting benefits over

future years, is nevertheless a deductible expense for the year in which expended [citing cases]." (*E. H. Sheldon v. Commissioner,* 214 F. 2d 655, 659 (1954).)

Cases Relied Upon by Appellant.

In *Crocker First National Bank v. Commissioner,* 59 F. 2d 37 (1932), this Court held that amounts expended by a bank to deepen the foundation of its building so as to conform to the local building regulations, were to be capitalized. However, the Court observed that the amounts expended "* * * resulted in permanent physical alteration of the premises, undoubtedly increasing the value thereof." (59 F. 2d at p. 39.) No premises or other property of appellee's was permanently altered, nor was it increased in value. Accordingly, this case is inapposite.

In *Schwabacher v. Commissioner,* 132 F. 2d 516 (1943), this Court held that the expenses of attorney's fees, litigation and settlement to *procure* a seat on the New York Stock Exchange (a capital asset), were expenses incurred in *perfecting* title to a capital asset, and hence should be added to the cost thereof and not deducted as an expense. We do not believe appellant's citation to this case to support the statement: "the cost of *defending* title is a capital expenditure" (emphasis supplied) (Br. pp. 15-16) is accurate. In fact this Court in its opinion called attention to the fact that there is a distinct difference between expenses incurred for *perfecting* or acquiring title and those incurred in *protecting* title, holding that the latter are deductible whereas the former must be capitalized. This difference has significance in the present case, in view of an analogy appellant makes

on page 12 and in the footnote on page 13 of his brief. Appellant compares the microfilming expenses to those of a lawyer *acquiring* a library, *i. e.,* a full set of United States Reports. But that is not this case. Appellee did not, by the microfilming, *acquire* a library; rather it *maintained* and *protected* the library it already had.

This Court held, in *New Idria Quicksilver Mining Co. v. Commissioner,* 144 F. 2d 918 (1944), that the taxpayer's advance payments to a power company, so that it would install a transition line to the taxpayer's property, constituted an "operating expense" which "should have been prorated over the probable life of the operation." (144 F. 2d at p. 921.) This appears to be a ruling concerning the proper allocation of an advance payment for power service. This case does not appear to support appellant's argument.

Appellant also relies upon two cases involving expenditures made by newspapers to *acquire* or *increase* their circulation structure. (*Meredith Pub. Co. v. Commissioner,* 64 F. 2d 890 (C. C. A. 8, 1933) Cert. Den. 290 U. S. 676; and *Public Opinion Pub. Co. v. Jensen,* 76 F. 2d 494 (C. C. A. 8, 1935).) Such expenditures are made solely to increase the circulation, admittedly a capital asset, and to increase earnings. Neither circulation nor earnings were increased as a result of appellee's microfilming. The expenses of microfilming are more closely analogous to those of *maintaining* a newspaper circulation, which expenses, as pointed out above, are deductible as ordinary and necessary business expenses.

Appellant also relies upon *Parkersburg Iron & Steel Co. v. Burnet,* 48 F. 2d 163 (C. C. A. 4, 1931) and *Russell Box Co. v. Commissioner,* 208 F. 2d 452 (C. C. A. 1, 1953). These cases are somewhat similar. Both

taxpayers, while engaged in war work, upon the suggestion of government officials, made substantial physical improvements which increased the value of their respective properties. In the *Parkersburg* case the changes made included the tearing out of two floors of a building, strengthening general structure by introduction of steel beams, placing skylights in a roof, installing new foundations for certain machinery, laying a new concrete floor, and re-arranging certain line shafting. In the *Russell Box Co.* case the physical improvement was the erection of a substantial wire mesh fence around the taxpayer's plant. In both cases, the trial court found as a fact that substantial capital assets had been acquired as a result of the expenditures, and in both cases the Circuit Court of Appeals, giving appropriate weight to the trial court's determination of an issue of fact, affirmed, since the lower court's decision was not clearly erroneous. Aside from the differences in fact, which are glaring, the instant case is in the opposite posture before this Court, and these two cases should give appellant little comfort. Thus, the District Court's judgment, based upon findings that no capital asset has been created by the microfilming expenses, and its findings that the expenses are ordinary and necessary, should be affirmed by this Court, because it certainly cannot be said that the District Court's findings are clearly erroneous.

The Commissioner's Ruling.

The Commissioner of Internal Revenue has ruled that

> "* * * in the case of a newspaper publisher the cost of microfilming newspaper files which may reasonably be considered current records and the cost of periodic microfilming of future editions are deductible as ordinary and necessary business ex-

> penses for the year in which such expenditures are paid or incurred * * *". (I. T. 3732 (1945 Cum. Bul. 88)),

This ruling is quoted in the Appendix of Appellant's brief.

In the instant case the District Court has found as a a fact that, in addition to the microfilming completed in 1943 and 1944, the taxable years before this Court:

> "Plaintiff has continued to the present time to microfilm its current newspapers, the filming being done once a month, and the expense thereof is and has been allowed by the Commissioner of Internal Revenue as an ordinary and necessary business expense. Plaintiff also continues to bind two sets of its current newspapers." [R. 37.]

Appellee urges that this ruling, together with its specific application to this taxpayer, through the Commissioner's allowance just referred to, establish beyond question the general nature and purpose of microfilm expense, as being ordinary and necessary in the conduct of a newspaper business. However, the Commissioner, in the same ruling referred to above, goes on to hold that:

> "* * * the cost of microfilming old newspaper files which are not classifiable as current records should be capitalized and recovered through depreciation allowances under Section 23(1) of the Internal Revenue Code." (I. T. 3732 (Cum. Bul. 88, 1945).)

Appellee's answer to the portion of the Commissioner's ruling just quoted is that to this extent the Commissioner's ruling is in error. The applicable statute pro-

vides that amounts paid to increase the value of any property or estate cannot be deducted. (Sec. 24(a)(2) of the Int. Rev. Code of 1939.) They must be capitalized. The amounts expended for microfilms did not create an asset or capital value; they did not increase the net or gross income; they did not improve the original plant, or increase, extend or prolong its useful life; they permitted appellee to maintain its business on the same scale, but not to increase it; the District Court has found these to be the facts. [R. 38-39.] In view of these facts, which are supported by substantial evidence, it is clear that appellee's property was not increased in value and therefore the statute does not preclude deductibility. Nor is there any basis in logic or reason for the distinction the Commissioner attempts to make in the ruling referred to above. He cannot by mere administrative fiat change the general nature, purpose and character of a newspaper's microfilm expenses from ordinary and necessary business expenses to capital outlays; to the extent that he has attempted to do so, he has exceeded his authority; and, accordingly, the last quoted portion of his ruling should not be followed by this Court, as it was not followed by the Court below. The enormity of the last portion of the ruling appears when we attempt to apply it. Is a large metropolitan newspaper which microfilms every month to be treated differently from a small town newspaper which, for exactly the same purpose, but in order to avail itself of economy through volume, waits until every third, or fifth or tenth year to microfilm its old issues? Merely to state such a proposition refutes it.

II.

The District Court's Findings of Fact Are Supported by Substantial Evidence; They Are Not Clearly Erroneous.

The District Court found as a fact that:

"V.

On February 25, 1942, enemy aircraft were reported to have flown over the Los Angeles area and to have been driven off by anti-aircraft defenses. Because of the fear of a bombing, discussions were commenced the following day between the then Treasurer, Secretary and Comptroller of plaintiff and his then assistant (the present Treasurer and Comptroller) looking to the protection of plaintiff's newspaper files, and from those discussions evolved the determination to microfilm the newspapers." [R. 36.]

Appellant's objection to this finding is somewhat elusive. It is admitted that "* * * such a finding is justified by the testimony," if the Court merely meant that these discussions first raised the question and thereafter by a process of "evolution" a decision to microfilm was eventually made. (Br. p. 17.) That is all the Court found as a fact in the contested finding, so it appears that appellant's objection to it dissolves by its own admission.

Notwithstanding appellant's admission, it is submitted that this finding is a fair statement of the testimony of the witness Harry W. Bowers, Treasurer and Comptroller of The Times-Mirror Company, appellee, at pages 55-59, and 63 of the printed record. Since, in view of appellant's admission, we do not believe this finding to be seriously disputed, we will not reproduce that testimony

here, but will proceed to what we believe to be the real objection of appellant.

The District Court also found as a fact that:

"IX.

The microfilming was not done to, nor did it, improve the original plant of the plaintiff, or increase, extend or prolong its useful life. It was not done to, nor did it, increase the net or gross income of the plaintiff. It was done solely as a means of protection against the threatened bombing, to permit plaintiff to maintain its business on the same scale, but not to increase it. It did not create an asset or capital value. It was an ordinary and necessary business expense." [R. 38-39.]

This finding is amply supported by the evidence, which is uncontroverted in the record. Examples of pertinent testimony of Harry W. Bowers, appellee's Treasurer and Comptroller, are as follows:

"Q. Now I will ask you if the microfilming of the old records was done to improve or prolong the assets of The Times-Mirror Company? A. No. They will not improve the assets or prolong them." [R. 62.]

"Q. * * * After you had procured the negative and your 3 positive prints, did you dispense with any of the old bound issues you say you had in two sets? A. No. We have not.

Q. You have kept them just the same? A. We kept them and continued to use them as we had before.

Q. Was this microfilming done for the purpose of conserving or preserving space? A. No. It was not.

Q. In other words, you kept your old records just the same, in 2 sets? A. We maintained the procedure, that is of making 2 sets." [R. 58-59.]

* * * * * * * *

"Q. Well, have the bound volumes been used any less because of the microfilming? A. No." [R. 61.]

* * * * * * * *

"Q. * * * I will ask you, Mr. Bowers, if the microfilming of the old records you have talked about here was done for any other purpose than to protect the Plaintiff [appellee] and its records? A. No. It was not." [R. 63.]

* * * * * * * *

"Q. * * * Now, Mr. Bowers, do I understand your testimony that it was because of the general alarm about an air raid at Los Angeles at that time, you decided to microfilm your old past issues? A. Due to that warning, the danger was discussed and from that it resulted eventually in the contract of having the back issues microfilmed.

Q. And then you did go ahead, you had the microfilming done and you had the negatives developed? A. Yes, that is right, and we had 3 prints made.

Q. And where did you put the negative films? A. The negative films are lodged in the Treasurer's safe in The Times-Mirror.

Q. On what floor? A. On the 4th floor.

Q. Did you also have some positive prints made from the negatives? A. We had 3 made. One is lodged in the editorial department on the 3rd floor of The Times Building outside of their vaults, one set is lodged with the Los Angeles Public Library, and one with the Huntington Library.

Q. Will you tell the Court why you lodged a copy of the positive prints in the Public Library and a copy in the Huntington Library? A. It was mainly to spread the copies. If our building was destroyed, we would take the chance that perhaps one copy would be preserved at the Public Library or maybe at the Huntington Library. That was further east from the coast, so we lodged one out there.

Q. Did the Public Library or the Huntington Library pay The Times-Mirror anything for the positive prints? A. No. They did not." [R. 57-58.]

* * * * * * * *

"Q. * * * I will ask you, Mr. Bowers, if any part of the costs of the microfilming was charged on the books as capital? * * * A. They were not charged as capital on the records of the Company." [R. 63-64.]

"Q. I believe you stated that the purpose of the microfilming was to avert a bombing result or to safeguard having copies of the Times in the event of a bombing? A. To preserve those records, yes." [R. 77.]

* * *

"Q * * * At the time you decided to microfilm those old newspapers, wasn't one consideration that sooner or later the paper itself would wear out or decay? * * * A. No. I never heard that discussed and I will tell you why it wouldn't be discussed. There is the second volume." [R. 78-79.]

Appellee respectfully suggests that the above-quoted finding of fact is amply supported by substantial evidence.

Appellant can point to no evidence which contradicts the testimony of Mr. Bowers. This being so appellant seeks to negate its effect by claiming that the report of the bombing on February 25, 1942, was "a false alarm"; and by attempting to create the impression that the war was practically over by September, 1943, when microfilming was begun.[4] There is no evidence whatsoever in this record indicating that the report of the bombing was "a false alarm." On the contrary, Exhibits 1, 2 and 3 (not printed in the Record) vividly create the opposite impression. The war was far from over in September, 1943; nor were the Japanese in retreat.[5]

Application of Rule 52(a) of the Federal Rules of Civil Procedure.

The District Court's finding that the amount expended for microfilming "* * * was an ordinary and necessary

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[4]The delay in beginning microfilming was explained by Mr. Bowers. He stated that microfilming in the early 1940's was a new procedure and that there had not been much experience with it. [R. 83.] Information had to be gathered concerning how such a job as that sought to be undertaken could be done; difficulties had to be surmounted and time was needed to explore various possibilities. [R. 83-86.] He consulted Eastman Kodak Company, and they indicated that to do a job of this size they would have to make a special setup in Los Angeles. [R. 83-86.] After investigation, the decision to microfilm was finally made in the spring of 1943 and the contract signed with the Microstat Company in July 1943. [R. 71, 85-86.] The actual microfilming work started in September, 1943, and was completed in the fall of 1944. [R. 71.]

[5]It was not until February, 1944, that the United States Marines began to take the Marshall Islands and Kwjalein; thereafter came bloody engagements for Truk (February 1944); New Britain (April 1944); Hollandia (April 1944); Saipan (June 1944); Guam (July 1944); the Carolines (September 1944); Peleliu (November 1944); Iwo Jima (February 1945); and Okinawa (April 1945). It was not until October 19, 1944, that General Douglas MacArthur returned to conquer the Philippine Islands.

business expense" [R. 39] is a finding of fact which, as has been pointed out heretofore, is supported by substantial evidence. This is the ultimate fact essential to recovery of the taxes overpaid by appellee. *Botany Worsted Mills v. United States,* 278 U. S. 282 (1929); and *McGee v. Nee,* 113 F. 2d 543 (C. C. A. 8, 1940), where it was stated that:

> "The ultimate fact essential to a recovery by the plaintiff under his complaint was that the deduction disallowed by the Commissioner was an ordinary and necessary business expense * * *" 113 F. 2d at 546.

Rule 52(a) of the Federal Rules of Civil Procedure provides in part that:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

The extent of the 1944 Japanese "retreat" (as characterized by appellant) is manifest from the fact that the Philippine Islands were not declared liberated from Japanese rule until July, 1945; moreover, during the summer and fall of 1944, the Japanese offensive in the China-India-Burma theatre compelled United States Forces to abandon at least five major air fields (Hengyang, June 30, 1944; Kweilin, September 17, 1944; Kwangsi, October 1, 1944; Liuchow, November 13, 1944; and Nanning, November 26, 1944). Nor was the picture in Europe as rosy as appellant would now paint it. From January through May, 1944, the Allied Armies took a terrific beating at the Anzio Beachhead. During February and March, 1944, Allied Forces were being routed at Cassino. D-Day —the long awaited second front in Europe—did not begin until June 6, 1944, and it was August 15, 1944, before the Allies landed in Southern France. Although counsel for appellant may now, substantially more than ten years after the events, profess a unique *nunc pro tunc* clairvoyance, we respectfully submit that the responsible officials of Appellee acted with reasonable business judgment in the circumstances when they decided to microfilm their back newspapers to protect them from bombing. See History of World War II (Francis Trevelyan Miller—1945—Chronology of World War II, pp. 943-966).

The above rule has been applied by this Court in many cases. In the recent case of *Stockton Harbor Industrial Co. v. Commissioner,* 216 F. 2d 638 (1954), this Court, said in its opinion in part:

> "* * * this court and other courts have held that it is not our function to retry questions of fact determined by the trial court upon conflicting evidence or even upon uncontradicted evidence where different inferences may reasonably be drawn from them. [Citing cases.]" (216 F. 2d at 640.)

See also:

Ellsworth M. Dunn v. Commissioner, 218 F. 2d ..... (C. C. A. 9), decided March 11, 1955;

Talache Mines v. United States, 218 F. 2d 491 (C. C. A. 9, 1954);

Brownell v. Lee Mon Hong, 217 F. 2d 143 (C. C. A. 9, 1954);

Shew v. Dulles, 217 F. 2d 146 (C. C. A. 9, 1954);

United States v. Kintner, 216 F. 2d 418 (C. C. A. 9, 1954); and

Gamewell Co. v. City of Phoenix, 216 F. 2d 928 (C. C. A. 9, 1954).

The Circuit Court of Appeals for the Sixth Circuit has recently held that the decision of the lower court, if supported by the facts in evidence, should not be reversed even though, if the matter were before the Appellate Court in a trial *de novo,* the decision might have gone the other way saying in part:

> "* * * We are unable to say that the facts in this case do not support the Tax Court's finding. * * * Unless clearly erroneous, the finding is binding upon us. * * *"

Gotfredson v. Commissioner, 217 F. 2d 673, 677 (C. C. A. 6, 1954).

It is respectfully submitted that the decision of the District Court in the instant case is amply supported by the uncontradicted evidence of record; that the decision is not clearly erroneous; and that therefore the decision of the District Court should be affirmed.

Conclusion.

The Findings of Fact, Conclusions of Law and Judgment of the District Court are supported by substantial evidence; they are not clearly erroneous; the expenditures for microfilming constitute ordinary and necessary expenses incurred in carrying on appellee's newspaper business, in any event; and therefore the judgment should be affirmed.

Dated March 31, 1955.

Respectfully submitted,

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